

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Thomas F. BOURDO 163624

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2475

Thomas F. BOURDO

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701.

By order dated 4 November 1987, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's Merchant Mariner's Licenses for a period of seventeen months. The licenses were suspended outright for the first five months of this suspension period. Appellant would serve the following twelve months of the suspension on probation provided that no charge under 46 U.S.C. 7703 or 7704, or any other navigation or vessel inspection law, was proved of outright suspension or acts committed within twelve months from the date of termination of the foregoing outright suspension. This order was issued upon finding proved the charges of misconduct and violation of regulation. Each charge was supported by thirty-one specifications. A charge of negligence supported by nine specifications was withdrawn by the Investigating Officer prior to Appellant's answer being entered.

The specifications under the misconduct charge found proved alleged that Appellant, while acting under the authority of the captioned licenses, did, while serving as operator aboard the M/V ARAWANNA QUEEN, on thirty-one occasions from on or about 19 July 1986 to on or about 22 June 1987, wrongfully operate said vessel on the Maumee River, Ohio, the Detroit river, Michigan, and/or various locations on Lake Erie, while the captioned license No. 163624 was expired.

The first specification under the charge of violation of regulation found proved alleged that Appellant, while acting under the authority of the captioned licenses, and serving as operator aboard

the M/V ARAWANNA QUEEN, on or about 19 July 1986, while operating said vessel on the Maumee River, in Toledo, Ohio, between the Moorings and I-75 overpass, failed to comply with the requirements of the Certificate of Inspection, in accordance with 46 CFR 185.20-1, to wit: operating with less than two licensed operators. As before, the remaining thirty specifications allege similar instances when the Appellant wrongfully operated his vessel with less than the two required licensed operators.

The hearing was held at Toledo, Ohio, on 1 September 1987. Appellant appeared at the hearing with counsel, and entered, in accordance with 46 CFR 5.527(a), an answer of admit to the charge of misconduct and each supporting specification. To the charge of Violation of Regulation, Appellant answered admit to Specifications 2, 3, 5, 6, 7, 20, 26, 27, and 29, and answered no contest to the remaining specifications under this charge.

The Investigating Officer introduced in evidence seven exhibits and called no witnesses.

Appellant introduced one exhibit into evidence and called no witnesses. Appellant testified in his own behalf.

A Stipulation was offered by the Investigating Officer and the Appellant and was admitted by the Administrative Law Judge as Exhibit IO-Res 1A.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that each charge and respective specification had been found proved, and entered a written order suspending all licenses and/or documents issued to Appellant as specified above.

The complete Decision and Order was dated 4 November 1987 and was served on Appellant by certified mail on 4 November 1987. An interim written order was served on Appellant by certified mail on 4 September 1987. Notice of Appeal was timely filed and the appeal considered perfected on 1 October 1987.

FINDINGS OF FACT

Appellant was the holder of Coast Guard Merchant Mariner's License No. 163624, which expired on 15 July 1986. Appellant is the holder of Coast Guard Merchant Mariner's License No. 272387, which was last issued on 1 July 1987. Appellant's licenses authorized him to

serve as operator of a mechanically propelled passenger carrying vessel of not more than 100 gross tons upon waters other than oceans and coastways, not including waters governed solely by the International Regulations for the Prevention of Collisions at Sea, 1972.

The M/V ARAWANNA QUEEN, 95 gross tons, O. N. DN 634432, is a documented vessel under the laws of the United States. Built in 1981 in Warren, Rhode Island, she is owned by Gladioux Marine Corporation of Toledo, Ohio, and operated by Toledo River Cruise Lines of Toledo, Ohio, as a small passenger vessel. The vessel is 102.30 feet in length.

As set forth in the specifications supporting the misconduct charge, on thirty-one occasions between 19 July 1986 and 22 June 1987, the Appellant wrongfully operated the small passenger vessel ARAWANNA QUEEN on the navigable waters of the United States while the captioned license No. 163624 was expired. As a result, Appellant on these occasions further violated 46 CFR 185.20-1 in that the ARAWANNA QUEEN was operating with less than the two required licensed operators.

BASES OF APPEAL

Appellant raises the following issues on appeal:

- 1) The Administrative Law Judge's written order of 4 September 1987 is not consistent with the order announced at the hearing on 1 September 1987. Since this constitutes a clear difference with the record the written order should be corrected to conform with the order announced at the hearing.
- 2) An order of suspension of seventeen months for misconduct is too severe and should be reevaluated on appeal.

Appearance: By Merritt W. Green, III, Esq.
GREEN & FRANK
434 Spitzer Building
Toledo, Ohio 43604

OPINION

I

Appellant argues that the Administrative Law Judge's written order dated 4 September 1987 is not consistent with the order he announced at the hearing on 1 September 1987. I disagree.

At the conclusion of the hearing on 1 September 1987, the Administrative Law Judge announced his intentions regarding a final written order:

"It seems to me that in view of these large number of Specifications, balanced with the fact that there has not been a safety violation to speak of, but also the fact that there is a charge also of violation of Regulation, that your license should be suspended for five months outright starting today, that (sic) I will then put you on probation...You will be placed on probation for one year after expiration of the five month order. That will include some of the winter season, and indeed it's probably near the end of your season, and it's my estimation that the penalty is not overly harsh. It's suitable in the circumstances." (Transcript at pp. 147-148) (Emphasis added).

The Administrative Law Judge's interim written order of 4 September 1987 states on page 1:

"T IS ORDERED that License No. 163 624 and 272 387 issued to respondent...are SUSPENDED for a period of SEVENTEEN (17) months. The first FIVE (5) months of said suspension shall be OUTRIGHT beginning 01 September 1987, the date on which this order is served on him. The remaining TWELVE (12) months of said suspension shall not be effective provided no charge under 46 U.S.C. 7703 or 7704, or any other navigation or vessel inspection law, is proved against the respondent for acts committed during the foregoing period of outright suspension or for acts committed within TWELVE (12) months from the date of termination of said foregoing outright suspension." (Emphasis added).

Upon review of the record, I find that the Administrative Law Judge's remarks concerning his final written order made on 1 September

1987 at the hearing are consistent with both the interim written order of 4 September 1987 and the final Decision & Order of 4 November 1987. Appellant was awarded an outright suspension of his license for a period of five months to be followed by a twelve month probationary period. What the Administrative Law Judge did not address at the hearing was that a violation of the conditions of the probation would result in the further outright suspension of an additional twelve months. It was not the intent of the Administrative Law Judge to issue a binding verbal order at the conclusion of the hearing. (Transcript at p. 150). The remarks of the Administrative Law Judge at the hearing infer that an additional period of outright suspension would result if a violation occurred within the period of probation. The length of this additional period of outright suspension remained to be determined following the hearing. (Transcript at pp. 148-150).

In any event, only the Administrative Law Judge's written order is controlling and it becomes effective upon service of the written order. See 46 CFR 5.571(a); Appeal Decision 2132 (KEENAN); Appeal Decision 2162 (ASHFORD).

II

Finally, Appellant argues that the suspension order was too severe. I disagree.

The order imposed at the conclusion of a case is exclusively within the discretion of the Administrative Law Judge, and will not be modified on appeal unless clearly excessive or an abuse of discretion. Appeal Decision 2423 (WESSELS), Appeal Decisions 2414 (HOLLOWELL); Appeal Decision 2391 (STUMES); Appeal Decision 2379 (DRUM); Appeal Decision 2378 (CALICCHIO); Appeal Decision 2366 (MONAGHAN); Appeal Decision 2352 (IAUKEA); Appeal Decision 2331 (ELLIOTT); and Appeal Decision 2313 (STAPLES). Appellant has made no such showing here.

Appellant argues that the order in his case falls outside the suggested range of an appropriate order found in the table at 46 CFR 5.569(d). This table is only intended for information and guidance. It is constructed to address only periods of outright suspension. The Administrative Law Judge is not bound by the range of appropriate orders found in 46 CFR 5.56(d). See Appeal Decision 2362 (ARNOLD). An Administrative Law Judge has wide discretion to formulate an order adequate to deter the Appellant's repetition of the violations he was found to have committed. Cf. Atlantic Refining Co.

v. Federal Trade Commission, 381 U.S. 357, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965); Federal Trade Commission v. Henry Broch & Co., 368 U.S. 360, 82 S.Ct. 431, 7 L.Ed.2d 353 (1962).

A close reading of the Decision and Order indicates that the Administrative Law Judge carefully considered all the relevant factors in formulating an adequate order. (Decision and Order at 12-14). He considered the effects of Appellant's actions on the safety of the passengers on his vessel, which sometimes carries up to 400 people. He considered Appellant's competent performance and his safety record. He considered that Appellant had a responsibility to verify his license and take steps to renew it in a timely manner. He considered the fact that Appellant was the senior licensed operator in the company and the need for Appellant to set a good example for junior licensed personnel. The Administrative Law Judge also considered the impact on Appellant's livelihood. Also, he considered the numerous repetitions of these violations over the course of almost a year. Finally, the length of suspension reflected the seasonal nature of Appellant's operations. The outright suspension would encompass a portion of the winter season when the excursion vessel would not be in operation. The Administrative Law Judge stated that the probationary period would include the winter season so as to cover the following tourist season, when vessel operations would be expected to be at a peak. (Transcript at pp. 142-150). The Administrative Law Judge has authority to tailor the order appropriately in cases involving seasonal activity. See Appeal Decision 1793 (FARIA); Appeal Decision 1883 (TREVOR); and Appeal Decision 1887 (VIGILANT).

CONCLUSION

Having reviewed the entire record, I find that Appellant has not established sufficient cause to disturb the findings, conclusions, and order of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision and order of the Administrative Law Judge dated 4 November 1987, at Norfolk, Virginia is AFFIRMED.

CLYDE T. LUSK, JR.
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 27th day of November 1988.

3. HEARING PROCEDURE

.100 Table of Average Orders
not binding

12. ADMINISTRATIVE LAW JUDGES

.80 Modification of Order
seasonal nature of activity as a factor

13. APPEAL AND REVIEW

.10 Appeals
reducing severity of ALJ's order

.60 Modification of ALJ's Order
appropriateness of
order not modified unless obviously excessive
not excessive when beyond table of average orders

CITATIONS

Appeal Decisions Cited: 2132 (KEENAN), 2162 (ASHFORD), 1793 (FARIA), 1883 (TREVOR), 1887 (VIGILANT), 2313 (STAPLES), 2331 (ELLIOTT), 2352 (IAUKEA), 2378 (CALICCHIO), 2366 (MONAGHAN), 2379 (DRUM), 2391 (STUMES), 2414 (HOLLOWELL), 2423 (WESSELS), 2362 (ARNOLD).

NTSB Cases Cited: None

Federal Cases Cited: Atlantic Refining Co. v. Federal Trade Commission, 381 U.S. 357, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965); Federal Trade Commission v. Henry Brch & Co@., 368 U.S. 360, 82 S.Ct. 431, 7 L.Ed.2d 353 (1962).

Statutes Cited: None

Regulations Cited: 46 CFR 185.20-1, 46 CFR 5.569(d), 46 CFR 5.571(a).

***** END OF DECISION NO. 2475 *****

